STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2014
v	No. 312486 Leelanau Circuit Court
DANI RAY MALM, Defendant-Appellant.	LC No. 12-001770-FC

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b (victim between age 13 and 16 and related to defendant), and sentenced to serve concurrent prison terms of 18 to 40 years, with credit for 107 days served. Defendant appeals by right. We affirm defendant's convictions and sentences but vacate the trial court's amended order to remit prisoner funds.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his convictions. We review the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found all essential elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). We "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We will not revisit credibility issues on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

At trial, defendant testified that the victim fabricated the allegations to avoid the rules and supervision that he was attempting to enforce. The victim rebutted defendant's assertion; she testified that she and defendant engaged in digital and oral sex, as well as intercourse. Defendant notes that the prosecutor's case hinged on the victim's testimony and that the prosecution failed to introduce any forensic evidence or a confession.

Defendant's argument is simply an attack on the credibility of the victim. The jury, having convicted defendant of the charges, necessarily determined that the victim was credible. A rational jury could conclude solely from that testimony that defendant committed the charged offenses. MCL 750.520h ("The testimony of a victim need not be corroborated in [CSC]

prosecutions"); see also *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012) (complainant's testimony by itself can be sufficient to support a conviction of CSC).

II. ADMISSION OF OTHER ACTS EVIDENCE

Defendant next argues that the trial court abused its discretion admitting other acts evidence under MCL 768.27a and MRE 404(b). Defendant preserved this issue by objecting to the admission of this evidence. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id*.

The disputed evidence concerns prior incidents of sexual abuse when the victim was younger and other uncharged incidents roughly contemporaneous with the charged offenses. MCL 768.27a(1) provides in part as follows:

> Notwithstanding [MCL 768.27, the statutory equivalent of MRE 404(b)(1)], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .

CSC I is included within the definition of "listed offense." MCL 768.27a(2)(a).

MCL 768.27a(1) was designed to expand the range of admissible evidence in a case where the defendant is charged with a sexual offense against a minor. *People v Smith*, 282 Mich App 191, 204; 772 NW2d 428 (2009). Evidence admitted under MCL 768.27a(1) may be considered for its bearing on any matter to which the evidence is relevant and does not have to satisfy the more stringent requirements of MRE 404(b)(1). *Smith*, 282 Mich App at 204; *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Pursuant to MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Unfair prejudice may exist "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

Defendant argues that MCL 768.27a is unconstitutional because allowing the admission of "propensity testimony" violates the due process clauses of the United States and Michigan constitutions. Defendant's argument is without merit because it conflicts with our Supreme Court's decision in *People v Watkins*, 491 Mich 450, 470, 486-487; 818 NW2d 296 (2012), that courts must weigh the propensity inference of such evidence in favor of its admissibility. The statute represents a legislative policy that such "propensity evidence" should be admissible in CSC cases involving a minor victim where it is relevant. *Id*. at 475-477.

Defendant further asserts that the trial court erred in admitting other acts evidence under MCL 768.27a because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. But defendant's only argument regarding the danger of unfair prejudice is that the evidence permitted a propensity inference. This reasoning has been rejected by our Supreme Court. *Watkins*, 491 Mich at 486-487.

Moreover, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. In the case of other identical activity involving the victim occurring during the same time frame as the charged acts, the relevance cannot be overstated. Moreover, the trial court did not abuse its discretion merely because some of the acts occurred when the victim was four or five years old. There is no indication that any witness's memory of the earlier incidents had deteriorated. In sum, the trial court did not abuse its discretion in admitting the MCL 768.27a(1) evidence.

The next issue is whether the trial court abused its discretion in admitting under MRE 404(b) testimony from the victim's mother that defendant demanded sex in exchange for visitation privileges with the victim. MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. U Under MRE 404(b)(1), however, evidence of prior bad acts is admissible if (1) the evidence is offered for a proper purpose, i.e., something other than a character or propensity theory (2) is relevant under MRE 402, and (3) its probative value is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The trial court through its contemporaneous assessment of the testimony is best able to determine whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. *People v Waclawski*, 286 Mich App 634, 670, 780 NW2d 321 (2009).

Here, the testimony was relevant and offered for a proper non-character purpose. The testimony together with that of the victim's permitted an inference that defendant used a common scheme or plan to force relatives to perform sexual acts against their will in exchange for certain privileges. Although it is true that the victim was a child and her mother was an adult when the coerced acts occurred, the dissimilarities end there. Also, the trial court limited any unfair prejudicial effect when instructing the jury, "and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor engaged in misconduct sufficient to deprive him of a fair trial. Because there was no objection to any of the alleged instances of prosecutorial misconduct, this issue is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *Unger*, 278 Mich App at 234-235. Reversal is warranted only when a plain error resulted in a conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*. at 235. Further, reversal is not required if the prejudicial effects of an improper prosecutorial comment could have been cured by a timely jury instruction. *Id*.; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant asserts that the prosecutor committed misconduct by seeking to admit other acts evidence. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Defendant's arguments that the prosecutor committed misconduct by eliciting testimony that defendant mentioned putting a bullet in the head of the victim's mother and that defendant introduced the victim to marijuana and alcohol are also without merit. The bullet testimony countered defendant's argument that the victim's mother and defendant had a rocky relationship because the victim's mother was attempting to keep the victim away from him. The testimony regarding defendant's introducing the victim to marijuana and alcohol was in response to defendant's argument that he was upset at the victim for using marijuana and drinking. Moreover, even if there were error, we note that any prejudicial effect could have been cured by a timely jury instruction to disregard it. *Unger*, 278 Mich App at 235; *Watson*, 245 Mich App at 586.

Defendant also argues that the prosecutor misstated the law by telling the jurors that they could use the MRE 404(b) and MCL 768.27a evidence to show defendant's character and propensity. First, the prosecutor stated that the MRE 404(b) evidence was relevant to show that defendant had used and employed a common scheme. Additionally, the trial court instructed the jury that the MRE 404(b) evidence could not be used to prove defendant's character or propensity. Second, the evidence admitted under MCL 768.27a *is* admissible to show a defendant's propensity. *Watkins*, 491 Mich at 486-487.

Nevertheless, evidence admitted for a proper purpose may not be used for an improper purpose. Here, the prosecutor presented an improper character argument regarding testimony from the victim's mother, which was admitted under MRE 404(b), that defendant demanded sex in exchange for visitation privileges with the victim. The prosecutor stated in his closing argument the following: "What do we know about the *character* of the Defendant? Boy, [the victim's mother] sure told us a lot about that. Didn't she? You want to see your daughter? You want to be with your daughter? You're going to have to have sex with me." (Emphasis added). We find this was a plainly erroneous improper character argument but because we conclude that the misconduct did not affect defendant's substantial rights, reversal is not warranted. *Unger*, 278 Mich App at 234-235. Our review of the record, including the testimony of the victim and defendant, reveals that there was ample admissible evidence to support the jury's verdict and, therefore, there is no basis to conclude that the erroneous admission of the victim's mother's testimony was outcome determinative. Furthermore, reversal is not required because the prejudicial effects of the improper prosecutorial comment could have been cured by a timely objection and jury instruction. *Watson*, 245 Mich App at 586.

Defendant also argues that the prosecutor expressed a personal belief about the credibility of the victim, stating that "she told you the truth." While a prosecutor may not bolster a witness's credibility by asserting that she has some special knowledge that the witness is testifying truthfully, she may argue all reasonable inferences from the evidence as it relates to her theory of the case. *People v Bahoda*, 448 Mich 261, 276, 282; 531 NW2d 659 (1995). Thus, a prosecutor may argue from the evidence whether or not the defendant or a witness is worthy of belief. *Dobek*, 274 Mich App at 67. This is what the prosecutor did here. Moreover, the trial court properly instructed the jury that the lawyers' statements and arguments were not evidence. See *Unger*, 278 Mich App at 237.

IV. SCORING GUIDELINES

Defendant next argues that the trial court erred in scoring offense variables (OVs) 4, 10, 11, and 13. Defendant preserved this issue by challenging the guidelines scoring in a proper motion for resentencing. MCL 769.34(10); MCR 6.429(C); *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). The trial court's factual findings "are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *Id*.

A. OV 4

The trial court scored 10 points for OV 4, which is appropriate if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1). Defendant acknowledges that the victim suffered some psychological harm but disputes the trial court's finding that it was the type of serious psychological injury contemplated. In assessing the score, the trial court relied on the victim's impact statement that she was receiving counseling from the child advocacy center to address "a lot of emotions associated with the underlying offense[.]" The trial court also relied on a letter the victim submitted, characterizing the letter as "sufficiently bizarre that reflected something wrong with her." We find the court's finding was supported by the preponderance of the evidence. *Hardy*, 494 Mich at 438.

B. OV 10

The trial court scored 15 points for OV 10, which covers "exploitation of a vulnerable victim." This score is appropriate if "predatory conduct was involved." MCL 777.40(1)(a). "'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization. MCL 777.40(3)(a). This finding requires more than opportunistic criminal conduct or run-of-the-mill planning of a crime and involves conduct commonly understood as being "predatory" in nature, like lying in wait or stalking. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). Defendant engaged in at least two instances of predatory conduct. First, as the trial court noted, defendant turned the heat off in the victim's bedroom so that she would have to sleep in the same bedroom and bed as defendant to stay warm. Second, defendant exercised a level of authority over the victim such that she was forced to participate in sexual acts with him to gain privileges such as snowboarding, hanging out with friends, or going to the mall. Either of these is sufficient to support the trial court's finding that defendant engaged in predatory conduct.

C. OV 11

The trial court scored 50 points for OV 11, which covers "criminal sexual penetration." Fifty points are appropriate if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). Only criminal sexual penetrations "arising out of the sentencing offense" are to be scored under OV 11. MCL 777.41(2)(a). Defendant was convicted of one count of CSC I for digital penetration, one count of CSC I for oral penetration, and one count of CSC I for penile penetration. The victim testified that defendant had sexual intercourse with her on two occasions and that defendant also put his fingers and tongue inside of her vagina during each of these

incidents. This is a total of six penetrations; thus, there are at least three other uncharged penetrations that provide a basis for scoring OV 11 at 50 points.

D. OV 13

The trial court scored 25 points for OV 13, which covers "continuing pattern of criminal behavior," and 25 points are appropriate if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Although conduct scored under OV 11 is not to be scored, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a) and (c). In this case, the victim testified that defendant engaged in many other instances of digital and oral penetration in the months leading up to the conviction offenses scored under OV 11. Under these facts, we conclude that the trial court did not err in scoring OV 13 at 25 points.

V. IMPOSITION OF ATTORNEY FEES AND ELECTRONIC MONITORING

Defendant asserts that the trial court violated his double jeopardy rights and due process by imposing attorney fees and electronic monitoring. We agree in regard to the imposition of attorney fees, but we disagree in regard to the electronic monitoring. This issue is unpreserved because defendant failed to raise it below. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). So, it will be reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant had a court appointed attorney. At defendant's August 27, 2012 sentencing, the trial court stated that it would not impose attorney fees on defendant because he received a "very long prison sentence." Defendant's August 27, 2012 judgment of sentence likewise reflects that no attorney fees were imposed, only $334 in costs. A February 4, 2013 amended judgment of sentence again reflects that no attorney fees were imposed, only $334 in costs,[1] as does a February 26, 2013 order to remit prisoner funds that indicates that defendant owed $334. But a March 6, 2013 amended order to remit prisoner funds states that defendant owes a balance of $12,633.87.[2] It is clear that this amount includes attorney fees of $12,299.87.

The trial court at sentencing specifically stated that it was not imposing attorney fees on defendant, and neither the original or amended judgment of sentence indicates otherwise. Thus, pursuant to these documents, the trial court never officially ordered defendant to pay attorney fees; therefore, there is no sentencing decision imposing attorney fees for this Court to review under either double jeopardy or due process principles. See *People v Jones*, 203 Mich App 74,

[1] The judgment of sentence was amended to include lifetime monitoring pursuant to MCL 750.520n.

[2] Such an order "allow[s] the Department of Corrections to begin taking money from defendant's prisoner account to satisfy the various fees and costs imposed by the trial court." *People v Jackson*, 483 Mich 271, 276; 769 NW2d 630 (2009).

82; 512 NW2d 26 (1993)("A court speaks through written judgments and orders . . . ."). Rather, the problem is that the amended order to remit prisoner funds does not reflect the actual financial sanctions ordered by the trial court. Because the trial court has never actually imposed attorney fees on defendant, we vacate the trial court's amended order to remit prisoner funds, as it is contrary to the actual financial sanctions ordered by the trial court.

The trial court's decision, however, to amend the judgment of sentence to include electronic monitoring was proper. Although the trial court did not indicate at sentencing that defendant would be subject to electronic monitoring, and electronic monitoring was not ordered in the original judgment of sentence, electronic monitoring is statutorily required for defendant's CSC I convictions. MCL 750.520n(1); MCL 750.520b(2)(d). Because the trial court did not have discretion not to order electronic monitoring, the trial court's error was merely clerical; consequently, correcting that error did not offend the principles of double jeopardy or due process. See *People v Howell*, 300 Mich App 638, 650-651; 834 NW2d 923 (2013).

VI. STANDARD 4 BRIEF

Defendant raises three issues in his Standard 4 brief. The first issue concerns witnesses who were absent from trial; the second issue concerns the admission of a medical examination report, and the third issue concerns the right to effective assistance of counsel.

A. ABSENT WITNESSES

The essence of defendant's argument is that certain witnesses did not testify at his trial. Defendant asserts (1) that the prosecutor did not exercise the requisite due diligence in attempting to locate and subpoena these witnesses, (2) that he was prejudiced by the absence of these witnesses, and (3) that the trial court should have continued the trial so that these witnesses could testify at trial in his defense. Defendant believes that he was denied his right to due process and to a fair trial.

The res gestae witness statute, MCL 767.40a, imposes a duty on the prosecution "to attach to the information a list of all witnesses the prosecutor might call at trial and of all known res gestae witnesses, to update the list as additional witnesses became known, and to provide to the defendant a list of witnesses the prosecution intended to call at trial." *People v Koonce*, 466 Mich 515, 520-521; 648 NW2d 153 (2002), citing MCL 767.40a(1), (2), and (3). The prosecutor must also "render reasonable assistance in locating and serving process upon witnesses upon request of the defendant." *Id.* at 521, citing MCL 767.40a(5).

When the prosecution endorses a witness under MCL 767.40a(3),[3] it must exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). The prosecution may be excused from producing an endorsed witness if "the witness

[3] MCL 767.40a(3) states: "Not less than 30 days before trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial."

could not be produced despite the exercise of due diligence." *Id*. "If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Id.* If a material witness is absent at trial, it is within the trial court's discretion to grant a motion for a continuance or stay of proceedings. MCR 2.503(C)(2), (D)(1).

Without providing any documentary evidence in support, defendant asserts that the five identified witnesses would have provided favorable testimony: he has provided no affidavit or anything else from any of these people to indicate that they would have testified as defendant asserts. Any argument regarding these potential witnesses amounts to nothing more than speculation.

B. ADMISSION OF PHYSICIAN'S REPORT

Defendant asserts that a medical examination report prepared by a doctor who examined the victim was erroneously admitted as a substitute for actual trial testimony. He argues that he was deprived his Sixth Amendment right to confront and cross-examine the witnesses against him. However, defendant stipulated to the admission of the report. A party cannot stipulate to a matter and then argue on appeal that there was error. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

C. EFFECTIVE ASSISTANCE OF COUNSEL

The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. The factual findings are reviewed for clear error and the matters of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The ultimate decision whether counsel rendered ineffective assistance is reviewed de novo. *Id.* As no evidentiary hearing on the effectiveness of counsel has been held, we have no factual findings to review on defendant's ineffective assistance of counsel claims. Our review is limited to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Effective assistance of counsel is presumed, and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated counsel's conduct. *LeBlanc*, 465 Mich at 578. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant cannot overcome the strong presumption that sound strategy motivated counsel's decision to stipulate to the admission of the medical report rather than require live testimony from the doctor. The report contained information that was favorable to defendant, and defense counsel used the medical report to argue that the doctor's findings were, in part, inconsistent with the victim's allegations.

Defendant's argument that counsel should have had the jury foreman excluded from the panel is based on nothing more than speculation. The juror stated during voir dire that there was

no reason why he would not be a fair and impartial juror, and we will not presume otherwise on the basis of defendant's self-serving and unsupported assertions.

Regarding defendant's argument that counsel refused to ask the witnesses many questions defendant had posed, he does not indicate what counsel should have asked. We will not engage in conjecture.

We also reject the assertion that trial counsel failed to investigate and prepare a defense. Defense counsel stated at trial that he had in fact spoken with the attending doctor before trial. And defendant provides no evidence that counsel knew or should have known that the alleged res gestae witnesses would not appear without being subpoenaed.

We affirm defendant's convictions and sentences, but vacate the trial court's amended order to remit prisoner funds as it is contrary to the actual financial sanctions the trial court ordered.

/s/ Douglas B. Shapiro
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens